IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1581

BROWN TRANSPORT CORP.,
Petitioner,

vs.

ATCON, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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QUESTIONS PRESENTED

(1) Whether a state court can protect litigants involved in interstate commerce from harm, under established equity principles, when this protection does not violate the language or purpose of the Interstate Commerce Act.

(2) Whether the Interstate Commerce Act can be employed by Petitioner-Carrier to shift losses caused by its own improper practices onto Respondent-Shipper.

STATEMENT OF CASE

Briefly stated, this case arises from a long series of mistakes and oversights by both parties. In October of 1974, BROWN TRANSPORT CORP. (hereinafter "Petitioner-Carrier") received goods from ATCON, INC. (hereinafter "Respondent-Shipper") for delivery under "collect" bills of lading to Idaho Shippers Association (hereinafter "consignee") (Tr. 1, 5).

The initial oversight occurred when Respondent-Shipper failed to sign Section 7 of the Uniform Bills of Lading, thereby undertaking to pay freight charges even though goods were being shipped on a collect basis (Tr. 6). Next, Petitioner-Carrier delivered the goods to consignee on open account without first conducting a credit investigation on consignee as required by 49 CFR §1322.1 (R. 41, Tr. 6). Petitioner-Carrier then sent freight bills for the transportation charges to consignee (Tr. 6), rather than to Respondent-Shipper as required by 49 CFR §1322.1 (Tr. 6). Petitioner-Carrier realized there was a serious collection problem in March of 1975, some five months after delivery (Tr. 7), but continued its efforts to collect from consignee for another two months, at one point agreeing to payment of the freight charges over a twenty-four month period (Tr. 7). *Seven months after delivery*, Petitioner-Carrier was notified that consignee planned to file a bankruptcy petition (Tr. 7), and only then sent the first freight bill to Respondent-Shipper (Tr. 10).

Thereafter, Petitioner-Carrier filed suit against Respondent-Shipper in the Civil Court of Fulton County, Georgia (R. 3, 4). Respondent-Shipper answered, denying any indebtedness was due, and in addition pleading the affirmative defenses of estoppel, fraud, laches and waiver (R. 41). At the hearing, Respondent-Shipper made an oral motion for directed verdict based on Petitioner-Carrier's lax billing practices and upon Georgia case law (Tr. 10, 11). This motion was granted by the Court (Tr. 19).

ARGUMENT

I.

A STATE COURT CAN PROTECT LITIGANTS INVOLVED IN INTERSTATE COMMERCE FROM HARM, UNDER ESTABLISHED EQUITY PRINCIPLES, WHEN THIS PROTECTION DOES NOT VIOLATE THE LANGUAGE OR PURPOSE OF THE INTERSTATE COMMERCE ACT.

Petitioner-Carrier strenuously argues that Section 217 of the Interstate Commerce Act, 49 USC §317, imposes absolute liability upon Respondent-Shipper for the freight charges at issue, and claims that the principle of equitable estoppel cannot therefore be applied to defeat the claim. However, Section 217 simply forbids carriers from charging, demanding, collecting or receiving greater or less or different compensation than that specified in the tariffs. The purpose of this section is to prevent rate discrimination by compelling carriers to exact identical charges for identical services. See, e.g., *I.C.C. vs. North Pier Terminal Co.*, 164 F.2d 670 (7th Cir. 1948), *cert. denied*, 334 U.S. 815 (1948). Discrimination is involved when the question is the *amount* of the freight charge. Discrimination is not involved when the question is whether a particular party is responsible for the freight charge. For this reason, the Act does not purport to determine which party to a freight transaction shall be responsible for freight charges. *Louisville and Nashville Railroad Co. vs. Central Iron and Coal Company*, 265 U.S. 59, 44 S. Ct. 441, 68 L. Ed. 900 (1924). Nor does the Act withhold the protections afforded by equity from freight charge litigants. See, e.g., *Consolidated Freightways Corp. vs. Admiral Corp.*, 442 F.2d 56 (7th Cir. 1971).

In *Consolidated*, as in the present suit, the carrier had made unlawful credit extensions on freight charges while indicating by its silence that these charges had been paid. Since the carrier's silence had effectively prevented the defendant from protecting its position, and since the carrier had contributed substantially to its own loss by its unlawful and lax credit extensions, the Court held the carrier estopped to collect the freight charges from defendant. This was not the first time a carrier had been estopped from collecting freight charges against a defendant who had been misled into thinking it would not have to pay these charges. See, e.g., *Cincinnati Northern R. Co. vs. Beveridge*, 8 F.2d 372 (E.D. Va. 1925); accord, *Davis vs. Akron Feed and Milling*, 296 F. 675 (6th Cir. 1924).

For other cases in which a carrier has been held estopped from collecting freight charges, see *Southern Pacific Transportation Co. vs. Campbell Soup*, 455 F.2d 1219 (8th Cir. 1972); *Missouri Pacific R. R. vs. National Milling Co.*, 276 F. Supp. 367 (D.N.J.1967), *aff'd*, 409 F.2d 882 (3rd Cir. 1969); *Farrell Lines vs. Titan Industrial Corp.*, 306 F. Supp. 1348 (S.D.N.Y. 1969), *aff'd*, 419 F.2d 835 (2nd Cir. 1969), *cert. denied*, 397 US 1042 (1970). The case law in other states likewise favors the decision of the trial court in the instant case. See e.g., *Interstate Motor Freight System vs. Wright Brokerage Co.*, 539 S.W. 2d 764 (Mo. Ct. App. 1976); *Union Pacific Railroad v. Stadelman Fruit, Inc.*, 13 Wash. App. 824, 537 P. 2d 1076 (1975); *Lyon Van Lines, Inc. v. Cole*, 9 Wash. App. 382, 512 P. 2d 1108 (1973); *Tom Hicks Transfer Co. v. Ford, Bacon & Davis Texas, Inc.*, 482 S.W. 2d 364 (Tex. Civ. App. 1972).

In the present suit, Petitioner-Carrier made unlawful credit extensions when it delivered goods on open account without first taking precautions to assure that consignee would later pay the freight charges. By failing to send a freight bill to Respondent-Shipper for seven months, Petitioner-Carrier misled Respondent-Shipper into thinking the freight charges had been paid. When Respondent-Shipper finally did receive a freight bill, it was too late to pay the charges and then obtain reimbursement from the consignee because by this time the consignee was ready to declare bankruptcy. The Georgia court therefore properly held Petitioner-Carrier estopped from collecting the freight charges at issue from Respondent-Shipper.

II.

THE INTERSTATE COMMERCE ACT CANNOT BE EMPLOYED BY PETITIONER-CARRIER TO SHIFT LOSSES CAUSED BY ITS OWN IMPROPER PRACTICES ONTO RESPONDENT-SHIPPER.

Section 223 of the Interstate Commerce Act, 41 USC §323, prohibits a carrier from delivering freight before freight charges are paid unless the carrier complies with certain Interstate Commerce Commission Regulations governing credit extensions. Pursuant to these regulations, a carrier may not relinquish goods before payment of freight charges unless it has first taken precautions deemed sufficient to assure payment of these charges, 49 CFR §1322.1. Also, a carrier which delivers goods without receiving payment of freight charges is required to present a bill for the charges to the "shipper" within seven days following delivery, 49 CFR §1322.3. A "shipper" is defined in 49 CFR §1322.1 as the person who "undertakes to pay" the tariff charges.

In the present suit, Petitioner-Carrier first failed to make the required credit investigation of consignee, and next failed to bill Respondent-Shipper for seven months. Respondent-Shipper should have been billed within the prescribed seven days because it was the "shipper" for the purposes of the quoted regulation. This is true because Respondent-Shipper undertook to pay the freight charges when it failed to sign Section 7 of the bills of lading. Also, Respondent-Shipper was designated in all the bills of lading as "shipper" in the transaction (Tr. 21, 26, 27). Petitioner-Carrier should not now be allowed to employ the very Act which it violated to shift the losses caused by its violations onto Respondent-Shipper. As stated in *Consolidated*, *supra* at 62, "Congress did not intend [by passing Section 223] to fashion a sword to assure collection in every instance and a shield to insulate the carrier from the legal consequences of otherwise negligent or inequitable conduct."

CONCLUSION

For the reason set forth above, the Petition for Certiorari should be denied.

AFFIDAVIT OF SERVICE

STATE OF GEORGIA

COUNTY OF FULTON

D. Lake Rumsey, Jr., being first duly sworn, deposes and says that on the 24th day of July 1978, he served three copies of the foregoing Brief on BROWN TRANSPORT CORP., by depositing the same in the United States Mail, with first class postage prepaid, addressed to counsel of record at their post office address, to wit: Harry W. Bassler, Esq., H. Lowell Hopkins, Esq., Patrick J. McKenna, Esq., Suite 3625, 101 Marietta Tower, Atlanta, Georgia 30303.

D. Lake Rumsey, Jr.

Sworn to and subscribed
before me this 24th day
of July, 1978.

Notary Public

Notary Public, Georgia, State at Large
My Commission Expires June 2, 1980